the governmental interest in the *TIB Order*. As the Commission noted, the standardized labels for the specific regulatory costs that carriers were allowed to recover through line items "will encourage carriers to provide consumers with information that will enable them to understand their telecommunications bills, and prevent carriers from misleading consumers into believing they cannot 'shop around' to find carriers that charge less for fees resulting from federal regulatory action."[153]

Even if the Commission concludes that the regulatory line items being employed by carriers are not misleading, or are only potentially misleading, there should be no question that the information they convey to consumers is not particularly accurate or informative. Line items that charge certain monthly fee for various programs or several programs lumped together do not enable customers to understand their telecommunications bills any better than a charge labeled as "miscellaneous" for example. Furthermore, at least among major wireline IXCs, their regulatory line items are remarkably consistent in price: AT&T, Sprint, BellSouth and apparently Qwest – all charge customers $0.99 per month to cover the carriers' costs of regulatory compliance.[154] The fact that the major IXCs all charge an identical regulatory line item invites the question whether consumers believe they can shop around for lower charges. Certainly a consumer upset by being charged an extra dollar a month by Sprint is going to be less inclined to switch service if, after doing some research, the customer learns that AT&T, Qwest, BellSouth and others are charging the same amount for the same thing.

[153] *TIB Order*, ¶63.

[154] That all the carriers' line items are the same is particularly remarkable when one considers the fact that the charges purport to recover different costs. AT&T and BellSouth include interstate access charges in their line item charges, for example. Sprint does not. Meanwhile, it is unclear what regulatory costs Qwest's charge recovers. *See* IUB Comments, p. 3. Furthermore, the fact that each carrier is imposing a $0.99 surcharge is noteworthy given the fact that the carriers' customer bases vary substantially.

Some commenters question whether NASUCA has demonstrated that customers are actually harmed by the growing number of regulatory line items being assessed.[155] It is true that NASUCA did not canvas every carrier's website in order to ascertain its practices regarding regulatory line items. It is also true that NASUCA did not conduct a survey of carriers' customers or carriers to determine how many complaints or inquiries regarding regulatory line items had been submitted. This is hardly fatal to NASUCA's petition, however.

For one thing, NASUCA is not writing on a clean slate. Starting with the *TIB NPRM*,[156] the Commission has cited ample evidence regarding the failure of bills to provide customers with the information necessary "to understand readily the precise nature of charges appearing on [their] bills" and noted "many complaints and inquiries resulting from the practice of some carriers of including in their bills line item charges for universal service or access charges, without adequate explanation of the basis for these charges."[157] The Commission cited evidence of the numerous customer complaints received regarding unclear and confusing charges on phone bills in the *TIB Order* as well.[158]

In addition, NASUCA's concerns about the number of consumer complaints and inquiries are borne out by the comments submitted by parties supporting its petition. The Iowa commission noted that the number of customer inquiries it receives regarding carrier surcharges "runs into the hundreds, if not thousands . . . over the past few years."[159] Similarly, the State of Texas notes that it "has received countless bills containing instances of regulatory fees and surcharges purporting to recover 'regulatory' or 'administrative' costs, but which upon further

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[155] IDT Comments, pp. 1-3; MCI Comments, p. 7; Sprint Comments, pp. 8-9; RCA Comments, pp. 3, 5; SprintComments, pp. 8-9

[156] *In the Matter of Truth-in-Billing and Billing Format*, CC Docket No. 98-170, FCC 98-232, Notice of Proposed Rulemaking (rel. Sept. 17, 1998) ("*TIB NPRM*").

[157] *TIB NPRM*, p. 2 & Fn. 4.

[158] *TIB Order*, ¶ 3 Fn. 7.

[159] IUB Comments, p. 2.

analysis are nothing other than regular operating expenses. . . ."[160] The Minnesota Department of Commerce notes similar experiences, noting that, unlike some of the line items cited in NASUCA's petition, many carriers do not stop at billing customers a few dollars a month.[161] Other consumer groups and regulatory agencies cited similar experiences with numerous complaints and inquiries.[162]

Even the comments of NASUCA's opponents – when parsed closely – corroborate the harms cited by NASUCA. For example, MCI claims that "only 2% of the billing complaints" its customer relations department received from July 2003 through June 2004 were related to surcharges and fees.[163] As the Commission knows, if the number of billing complaints MCI receives is fairly large, 2% becomes a significant number of consumers. More enlightening are Sprint's comments. Sprint notes that, in the first two months after implementing its Carrier Cost Recovery Fee, it received 3,229 "inquiries" about the charge (though only 24 "complaints"). The company claims that this represents less than 0.1% of the accounts to which the charge is applied.[164]

Some commenters also cite Commission statistics to support their contention that line items are not a matter of concern. For example, Sprint notes that the Commission received a total of 10,592 "billing and rate" related complaints from wireless customers and 17,028 such complaints from wireline customers last year[165] and claims this represents a tiny percentage of the total wireless and wireline customer base. When viewed from a slightly different perspective, these numbers reach alarming proportions. Consider slamming. Over the past three years the Commission received about 23,900 slamming complaints – about 7,800 complaints per

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[160] Texas Comments, p. 2
[161] Minnesota Commerce Comments, pp. 5-6.
[162] *See* Consumers Union Comments, pp. 2-3; Nat'l. Consumers League Comments, p. 4; Comments of various individuals filed with the Commission.
[163] MCI Comments, p. 7.
[164] Sprint Comments, p. 17, Ftn. 37.
[165] Sprint Comments, p. 9; *see also* IDT Comments, pp. 2-3.

year.[166] By Sprint's reckoning, only a tiny percentage of long distance customers served nationwide have submitted a slamming complaint – but no one would dispute that slamming remains a major problem. In comparison, the total number of billing and rate complaints received by the Commission in 2003 tripled the number of slamming complaints during the same period and exceeded the total number of slamming complaints received by the Commission over the past three years *combined* (27,620 v. 23,900).[167] Of course, MCI and Sprint overlook the fact that a large number of consumer complaints regarding carriers' regulatory line items are received by state agencies as well. For example, the West Virginia commission received approximately 667 informal complaints regarding billing matters in 2003 – a healthy sum considering that the state only accounts for about 0.4% of wireline and wireless subscribers nationally.[168]

In perhaps an unintentional display of candor, the RCA tacitly admits the scope of the problem and the harm to consumers resulting from the plethora of regulatory line items being imposed by carriers. The RCA contradicts its assertion that NASUCA did not establish consumer harm by admitting that "[c]arriers are *acutely aware* of the nuisance and *intense irritation* caused to subscribers who feel "nickeled and dimed" by surcharges."[169] Carriers do not become "acutely aware" of customers' "intense irritation" regarding line items from an isolated complaint or two.

Some of the carriers (*e.g.*, Cingular, Nextel and VZW) assert that their regulatory line items recover their costs and are not profit centers, as alleged in CPI's October 2003 article cited

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[166] *The FCC Taking the Profit Out Of Slamming*, News Release, p. 1 (Aug. 5, 2004).

[167] NASUCA is not suggesting that every billing and rate related complaint involves carriers' line item charges. But given the anectdotal experience of NASUCA members and the comments filed by other consumer groups and individuals, NASUCA would expect the percentage of line item-related complaints to be statistically significant.

[168] Management Summary Report, p. 39 (Jan. 2004) (http://www.psc.state.wv.us/Mgmt_Sum/MSR2004_Report.pdf) *see also Local Telephone Competition: Status as of December 31, 2003*, Industry Analysis and Technology Division, Wireline Competition Bureau, Tables 9 & 13 (June 2004).

[169] RCA Comments, p. 7 (emphasis added).

in NASUCA's petition.[170] Only one carrier – Cingular – deigns to address the over recovery of costs in the wireless industry cited in CPI's article. However, Cingular merely claims that CPI is wrong and invites the Commission to rely on the cost estimates for wireless carriers' compliance with three programs (number portability, number pooling and E911) developed by the Progress & Freedom Foundation.[171] As previously noted by NASUCA, regardless of who is estimating the costs, two things are apparent: (1) CMRS carriers' cost of compliance are not reviewed by any regulatory authority; and (2) use of surcharges to recover these costs gives an advantage to less efficient carriers.

There is, therefore, ample evidence of harm to consumers resulting from carriers' increasing use of line items in general, and regulatory line items in particular. Adopting the reasonable restriction on carriers' use of line items, as requested by NASUCA, will go far toward reducing the harms noted in the Commission's *TIB Order*.

d. The restriction on regulatory line items sought by NASUCA is narrowly tailored to achieve the government's interest in accurate, and reasonable, regulatory line items.

Most opponents of NASUCA's petition argue the restriction on line items that NASUCA seeks is overbroad and unduly restrictive, and thus it is not narrowly tailored to achieve the government's interest under the fourth prong of the *Central Hudson* test.[172] Those opposing NASUCA's petition on this particular point rely upon legally and logically flawed arguments.

Contrary to opponents' assertions, NASUCA's proposed restriction would allow carriers to continue recovering: universal service fund assessments, the SLC fee, local number

[170] Petition, pp. 47-50. What is interesting to NASUCA is that so many of the carriers filing comments – AT&T, AWS, Nextel, MCI, and Sprint – make no effort to demonstrate that the amounts they recover in their regulatory line items bear any relationship to the costs of the regulatory programs the charges purportedly recoup.
[171] Cingular Comments, pp. 19-21.
[172] Competitive Coalition Comments, pp 2 & 5; BellSouth Comments, p. 4; CTIA Comments, pp. 19; Global Crossing Comments, p. 4; Leap Comments, pp. 15-16; MCI Comments, p. 13; NTCA Comments, p. 5; Nextel Comments, pp. 23-24; RCA Comments, p. 9; Sprint Comments, p. 10; US Cellular Comments, p. 10; Verizon Comments, pp. 13-15 & Fn. 36; VZW Comments, pp. 19-20.

portability (at least for ILECs), annual assessments for interstate TRS and the cost of administering the NANP, Commission annual regulatory fees, the federal telecommunications excise tax, and various state and local taxes and fees. What carriers would not be able to do is place line item charges on customer bills for such things as "compliance with government-mandated programs," or "regulatory compliance and proceedings," or "costs of government regulation." Nor would carriers be able to continue imposing lump sum charges to recover their costs of complying with "one or more" regulatory programs for which line items have been authorized.

NASUCA's proposal hardly "reinstates rate regulation" on the telecommunications industry,[173] or gives states the right to "engage in preempted rate regulation of wireless carriers,"[174] or destroys the competitive market that exists for long distance and wireless telecommunications service. Nor does NASUCA's proposal result in consumers receiving less information about the costs of government regulation.

Next, many commenters assert that, if there is a problem with such charges there are other, less sweeping measures to address the problem and these measures must be tried first.[175] However, finding the least restrictive measure to address the problem of line charges that confuse and frustrate customers is not what the law requires. In decisions applying the *Central Hudson* test, the Supreme Court has made it clear that the government is not obligated to find the

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[173] Sprint Comments, p. 10.

[174] Leap Comments, p. 6; Nextel Comments, p. 2.

[175] *See, e.g.*, RCA Comments, p. 9 (no dispute consumers should get full disclosure of charges and charges should be fair and reasonably related to regulatory costs, and if the Commission wants additional categorization or aggregation of charges, association is happy to participate); USTA Comments, p. 3 (the problem is that certain carriers are not complying with the Commission's binding TIB principles and the answer is not new rules but enforcement actions under 47 U.S.C. § 201); Competitive Coalition Comments, pp 2 & 5 (enhanced Commission consumer education efforts should be tried first and if that fails, use existing federal and state enforcement authority); Cingular Comments, p. 23 (take up uniform labels in the current *TIB NPRM*); CTIA Comments, pp. 13-16 (refrain from further regulation and give the voluntary Consumer Code for Wireless Service time to work); Global Crossing Comments, p. 4 (rely on enforcement actions and separate line items for administrative costs); Leap Comments, p. 16 (NASUCA should work with industry to develop standardized labels); NTCA Comments, p. 5 (Commission should simply enforce its current rules); Nextel Comments, pp. 24 (Commission should enforce existing TIB rules or develop federal billing guidelines for wireless carriers); Verizon Comments, pp. 14-15 (Commission should enforce the *TIB Order*).

least restrictive means of remedying problematic commercial speech. Instead, the government is merely required to show that the regulation is "narrowly tailored" to the asserted interest.[176]

According to the Court, "a regulation is narrowly tailored if the government's interest would be achieved less effectively without the regulation."[177] NASUCA's opponents do not seriously assert that the restriction on carriers' use of line items would not be effective in constraining carriers' increasing use of confusing and inaccurate line items – indeed, they suggest that the restriction would be too effective. However, as previously discussed, the restriction sought by NASUCA is not nearly as drastic as some commenters suggest. Moreover, the alternatives suggested by NASUCA's critics are all less effective than the restriction on regulatory line items proposed by NASUCA.

(i) Relying on enforcement of the TIB guidelines is inadequate.

Commenters suggest enforcement of the Commission's current TIB rules is enough. However, this measure simply preserves the *status quo ante* – which is not satisfactory. Relying upon individual consumers to bring Section 201 enforcement actions is not likely to be effective since it is absurd to expect consumers to file federal actions under Section 201 over a couple dollars a month in line items. Relying upon state commissions or agencies fails to recognize the fact that most state agencies are either inadequately staffed or are focused on the intrastate market and rarely file federal telecommunications actions on behalf of consumers. State agencies, moreover, are often precluded by statute from regulating wireless carriers and therefore neglect issues regarding that segment of the market. Relying on the Commission itself to bring

[176] *New Orleans Broadcast Ass'n.*, 527 U.S., at 188; *Bd. of Trustees*, 492 U.S., at 480; *see also* CTIA Comments, p. 19.

[177] *Ward v. Rock Against Racism*, 491 U.S. 781,798-99 (1989). Although *Rock Against Racism* was decided in the context of a content-neutral restriction on the time, place and manner of speech, the Commission cited this decision

Section 201 actions to enforce the requirements of the *TIB Order* sounds good, but NASUCA is unaware of the Commission having filed a single enforcement action against a carrier for violations of the billing requirements of the *TIB Order*.

Another problem with relying on enforcement actions to remedy misleading, deceptive or unreasonable carrier line items is the length of time associated with prosecuting a telecommunications complaint case through the federal courts. Allowing for one, possibly two appeals and the standard motions practice in federal court, an action is going to take years before it is resolved. This problem was eloquently pointed out in Minnesota's comments.[178] Then consider the fact, mentioned in NASUCA's petition, that there are approximately 1,000 IXCs and over 1,300 CMRS carriers that may be appropriate enforcement targets[179] and the task of enforcing the TIB rules through Section 201 becomes a daunting task indeed.

One other, obvious, problem with the suggestion that the Commission simply enforce its TIB rules: NASUCA's petition and the comments filed in response show clearly that there is deep and fundamental disagreement over what the rules currently allow or disallow. That uncertainty would have to be litigated in various federal courts, presenting the very real possibility of inconsistent or conflicting decision by the court.

(ii) Better consumer education efforts are unlikely to work.

Better Commission consumer education programs are, of course, welcome. Any program that helps consumers understand their telephone bills, and the telecommunications laws or regulations that apply to them, is beneficial. But communicating meaningful, easily understood information about widely varying billing practices among a multitude of carriers, to the widest possible audience, promises to be a frustrating and ultimately futile task. The difficulties

[178] Minnesota Commerce Comments, pp. 5-6.
[179] NASUCA Petition, p. 23, ftn. 61.

experienced by the NCL in trying to keep up with carriers' line items as part of its consumer outreach efforts[180] provides insight into the limitations of Commission or other regulatory outreach efforts to educate consumers.

(iii) NASUCA's experience suggests collaborative efforts to address billing practices are not likely to be effective.

Nor does NASUCA place much hope in some commenters' suggestion that industry and consumer groups work out standardized labels to propose to the Commission. For one thing, the Commission encouraged industry and consumer groups to do that five years ago and, to NASUCA's knowledge, no meeting was ever held. Nor does NASUCA's experience with other industry/consumer forums make it optimistic that such a forum would produce meaningful rules anytime soon. NASUCA – together with NARUC – sought to participate in the Intercarrier Compensation Forum's efforts to develop a comprehensive intercarrier compensation regime. As the Commission knows, those efforts were soundly rebuffed. Moreover, the length of time associated with such collaborative efforts to develop standardized labels, in a constantly shifting telecommunications industry ensures that, by the time such labels are proposed and adopted, they will in all likelihood be obsolete.

(iv) Deferring carriers' regulatory line items to the *TIB FNPRM* is not the answer either.

For similar reasons, NASUCA deferring the issues raised in its petition to the still pending *TIB FNPRM* will not address the issue of regulatory line items, which violate the Commission's current order.[181] For one thing, that notice focuses on the development of standardized labels for carrier line items, not the issue raised by NASUCA. If the Commission wished to take up the restriction urged by NASUCA in its petition, a new notice presumably would need to be prepared and issued, additional comments would be received – comments that

[180] NCL Comments, p. 4.
[181] Cingular Comments, pp. 22-23; CTIA Comments, p. 13 Ftn. 25.

would probably look a lot like the comments filed in this proceeding – and the Commission would, at some point in the indefinite future, adopt final rules. More importantly, standardized labels are unlikely to address all the issues associated with carriers' use of line items. Furthermore, by the time detailed standards for labeling could be developed, industry will likely have moved on to some new billing practice that confuses and frustrates consumers.

(v) Competition is no substitute for Commission regulations restricting carriers' use of regulatory line items.

Finally, some commenters opposing NASUCA's petition suggest that the most effective means of dealing with the confusion and abuse stemming from carriers' use of line items is to do nothing, to leave the ills caused by such fees to be cured by palliative effects of the competitive market.[182] However, the Commission has already spoken to the notion of leaving problems with carrier billing practices to be resolved by the invisible hand of the marketplace. In the *TIB Order*, the Commission rejected the broad notion that competitive forces suffice to constrain carrier practices that mislead, deceive, confuse or otherwise harm consumers.[183]

There is even less reason for the Commission to leave problems with carrier regulatory line items to be resolved by competition today. As noted by NASUCA, competition appears to be driving the carriers to utilize line item charges and fees with greater frequency in order to maintain at least the appearance of low monthly and usage rates.[184] Even NASUCA's opponents concede that the use of such fees is accelerating, though some brazenly suggest that it is

[182] Competitive Coalition Comments, p. 12; BellSouth Comments, pp. 11-12; Cingular Comments, p. 5; CTIA Comments, pp. 8-16; Leap Comments, pp. 6-12; MCI Comments, pp. 9-10; Sprint Comments, pp. 12-13; US Cellular Comments, p. 4; USTA Comments, pp. 7-10; Verizon Comments, pp. 6-8.
[183] *TIB Order*, ¶¶ 6-7.
[184] NASUCA Petition, p. 60.

government that is to blame for the recent rash of regulatory line items cropping up on customers' bills.[185]

Many commenters base their optimism in competition market on the power of "sophisticated" consumers who can figure out when they are being overcharged and "vote with their feet."[186] The evidence presented to the Commission previously in the TIB docket, as well as in this proceeding, suggests that the average consumer is not as sophisticated, not as powerful, as commenters suggest. Nearly all the individuals who filed comments in this docket appear to be wireless customers and most of their comments express fundamental confusion over the origin and purpose of the regulatory line items they are paying.[187] Some consumers also noted CMRS carriers' early termination penalties if they attempted to go to another carrier out of frustration with such charges.[188] Others noted that they changed carriers due to the high fees on their bills, only to find that their new carriers' fees do not result in any cost savings.[189] Perhaps customers in eastern Pennsylvania are an aberration rather than the norm but NASUCA doubts it, especially in light of consumer advocates' experience elsewhere.

Moreover, recent news reports suggest that wireless consumers are not so sophisticated, or that the wireless industry is so consumer oriented, that the Commission should leave them exposed to practices that are misleading or deceptive.[190] The Commission should, under the

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[185] NTCA Comments, p. 3 (the industry is in a "transition period" and the "more plausible explanation" for the confusing quality of customers' bills are "new regulations and unfunded mandates adopted on a daily basis").

[186] To be fair to these commenters, this sentiment is shared by some within the regulatory community as well. NASUCA believes that a *caveat emptor* approach to the growing use of regulatory line items, and the consequent growing frustration and confusion among consumers, would be an unjustifiable step backward from the pro-consumer objectives enunciated by the Commission in the TIB Order.

[187] Boyre Comments; Murray Comments; Coldren Comments. On the other hand, NASUCA wryly notes that some of the consumer commenters are pretty discerning. See, Marks Comments ("I feel Nextel is taking advantage of us. Maybe that's where they get their money for NASCAR, on my expense."); O'Donnell Comments ("I work with federal and state contracts that are easier to read than my cell phone bill.").

[188] Boyre Comments; Murray Comments; O'Donnell Comments.

[189] Coldren Comments; Reichert Comments.

[190] "Survey finds three-fourths of monthly wireless minutes go unused," RCR Wireless News (Aug. 5, 2004). According to this article, "sophisticated" wireless customers fail to use 78% of the minutes they pay for. Moreover, consumers with monthly plans advertised at $20 or less are paying 52% more when they are billed, and the average wireless household pays $17.75 on average in taxes, fees and additional surcharges.

circumstances, follow through on its pro-consumer efforts begun in the *TIB Order* and at least impose reasonable limits on the fees and surcharges carriers gin up and blame on government.

(vi) The CTIA Code will not deter CMRS carriers from violating the Commission's TIB Order.

Several commenters claim CTIA's Consumer Code for Wireless Service ("Code") provides CMRS carriers with sufficient incentive to give consumers enough billing information to make informed choices.[191] The Commission should reject this suggestion. CTIA's Code is a paradigm that lacks power: compliance with the Code is not mandatory; the consequences for non-compliance with the Code are minimal; and Code enforcement rests with the CTIA.[192]

CTIA claims that "each carrier's competitors will be watching other companies' compliance and will respond accordingly"[193] but that claim hardly guarantees Code compliance. CMRS carriers prefer voluntary self-regulation to mandatory regulation and enforcement because there is no rigorous examination of the carrier's advertising campaigns and billing practices and no record of any disciplinary efforts. Moreover, CTIA's members can change the Code at any time. With regard to the line items in issue, the significant discrepancies between the wireless carriers' advertised monthly base prices and the amounts listed on the consumer's ultimate bill (usually accounted for by line items) confuses consumers and shows that the Code is inadequate.

Until recently, no CMRS carrier was *required* to disclose to any consumer, prior to signing a contract, the total amount, or range, of line items that the consumer would pay for government-mandated and non-mandated cost recovery fees. On July 21, 2004, 32 states

[191] *See, e.g.*, CTIA Comments, p. 18, Nextel Comments, pp. 11-12.
[192] The Code sets 10 aspirational goals that all wireless carriers are encouraged to meet voluntarily. Carriers who choose to comply with the 10 points of the Code earn the right to use a CTIA seal, certifying their adherence to industry standards. Wireless carriers are not required to comply with the Code and those who do not face only the prospect of losing the right to use CTIA's seal in their advertising.
[193] CTIA Code (available at www.ctia.org).

announced a settlement ("Assurance of Voluntary Compliance" or "AVC") with VZW, Cingular and Sprint PCS, pursuant to which these carriers must disclose, clearly and conspicuously, at the point of sale (*i.e.*, the sales counter, on the web, and over the phone) prior to committing the consumer to a long-term contract:

> The fact that monthly taxes, surcharges, and other fees apply, including a listing of the name or type and amount (or, if applicable, a percentage formula as of a stated effective date) of any monthly discretionary charges that are generally assessed by Carrier on Consumers in a uniform dollar amount or percentage without regard to locale. For additional monthly discretionary charges that are assessed by Carrier on Consumers with regard to locale, Carrier shall clearly and conspicuously disclose that additional monthly fees will apply, depending on the customer's locale, and disclose the full possible range of total amounts (or percentage) or the maximum possible total amount (or percentage) of such additional monthly discretionary charges.[194]

These three carriers agreed to the AVCs' terms, demonstrating that it is not commercially impracticable for CMRS carriers to give consumers advance information about, among other things, line items. There is no reason why this Commission should not extend these requirements (and others) to the entire industry but regardless, the Commission should prohibit line items that were not mandated or authorized by a federal, state or local agency.

Finally, as NASUCA has repeatedly made clear, the restriction on carriers' regulatory line items it seeks does not foreclose all communication between carriers and their customers. If carriers want to tell their customers how much of their bill goes to funding government regulatory programs, go ahead. So long as the information is not misleading or inaccurate, NASUCA has no problem with carriers informing, even advocating to, consumers about the impact of government regulation on the industry. The only aspect of carriers' communications

[194] AVC, paragraph 18L. This is one of more than 14 disclosures these carriers must make under the terms of the AVCs, copies of which are attached to this filing. VZW, Cingular and Sprint PCS serve nearly 44 million consumers in the 32 states based on recent FCC data. *Local Telephone Competition: Status as of December 31, 2003,* Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission (June 2004), Table 13.

with their customers that NASUCA seeks to restrict is the one that comes with a price tag and inaccurate information.

V. THE CARRIERS' SHIFTING TAX BURDEN ARGUMENT IS UNFOUNDED.

The United States Communications Association ("USCA") and RCA claim that NASUCA's petition unfairly shifts the burden for fees, such as gross receipt taxes, excise taxes, right of way, and property taxes, by allowing jurisdictions to export fees onto consumers who reside outside their voting districts. They suggest this jeopardizes carrier business plans based on regional and national marketing. [195] These arguments are unfounded.

For starters there is no basis to assume that such shifting does not occur under the current regime of line items. NASUCA is challenging fees that are not mandated, and therefore not scrutinized, by regulatory agencies. Carriers could be shifting their taxes now without a consumer's knowledge and there is no evidence their monthly rates do not already recover some allocated or assigned costs arising from taxes and fees from outside the customer's voting jurisdiction. The Commission has chosen to forbear from regulating CMRS carriers' rates under Section 205 of the Act and, as Nextel points out, the Commission has repeatedly forbidden state utility commissions from examining these rates.[196] There is no guarantee, therefore, that wireless and long distance carriers' rates do not already contain hidden taxes and fees.

More importantly, the commenters overlook the fact that prohibiting all line items other than those mandated or authorized by the government will allow carriers to continue including line items for mandated taxes and fees. Other line items would be treated as a company's cost of doing business and incorporated in the advertised rates or, at a minimum, aggregated and disclosed at the point of sale.

[195] USCA Comment, pp. 4, 10, 11; RCA Comment, p. 8.
[196] Nextel Comment, p. 37, Fn. 102.

USCA relies on old precedent for the proposition that surcharges are appropriate to minimize tax exportation and there is nothing to indicate that the particular decision is controlling.[197] More importantly, USCA admits that the underpinnings of the case (tariffed long distance service charges) no longer exist.[198] USCA's and RCA's tax exportation argument should not prevent the Commission from prohibiting line item surcharges that are not mandated by federal, state, or local government.

Additionally, carriers' use of line item for non-mandated fees reduces their incentive to negotiate those assessments with the agency. By granting NASUCA's petition, the Commission spurs the carriers to examine their costs more closely, increasing their competitive efficiency, which benefits consumers who pay hundreds of millions of dollars or more each year in "undocumented, uninvestigated, and unregulated 'regulatory compliance' fees."[199]

VI. THE COMMISSION CANNOT USE THIS PROCEEDING TO PREEMPT STATE REGULATION OF CARRIER BILLING PRACTICES.

Despite Section 332(c)(3), state commissions regulate wireline carriers as to their billing information and billing practices,[200] and many states prohibit all carriers from engaging in unfair trade and deceptive advertising practices.[201] Nextel wants the Commission to preempt these state consumer protection statutes and regulations,[202] but the Commission should not follow that path.[203] Time and time again, federal courts have permitted individuals to pursue state

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[197] USCA Comments, p. 11, *citing Connecticut Office of Consumer Counsel v. FCC*, 915 F.2d 75 (2d Cir. 1990).
[198] *Id.* at 7-8.
[199] Mass. AG Comment, p. 3.
[200] *See, e.g.*, "Residential Billing and Termination Practices – Telecommunications Companies," D.P.U. 18448, Massachusetts Department of Telecommunications and Energy, available online at: http://www.mass.gov/dte/telecom/18448.pdf.
[201] See, e.g., Ohio Consumer Sales Practices Act, R.L. §§ 1345.01 et seq.; Massachusetts Consumer Protection Act, M.G.L. c. 93A, §§ 1-11; Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 et seq.; Iowa Consumers Fraud Act, Iowa Code § 714.16.
[202] Nextel comments at 31.
[203] Nextel contends that Commission should dismiss the NASUCA petition because it should have been styled as a petition for a rulemaking. Nextel comment at 28. By the same standard, Nextel's effort to persuade the Commission to pre-empt state consumer protection laws should be submitted as a Nextel petition for rulemaking, not as a comment on NASUCA's petition for declaratory relief.

jurisdictional claims over wireless companies based on state consumer protection laws.[204] It is Nextel, not NASUCA, that is blurring the distinction between rate regulation and terms and conditions regulation. NASUCA's petition clearly addresses carriers' billing and advertising, not rates, so Nextel's preemption argument fails.[205]

Apparently subscribing to the theory that "the best defense is a good offense," Nextel suggests that NASUCA's petition should be denied on, among other things, procedural grounds, but then suggests that the Commission should: (1) declare that matters regarding line items are entirely within the Commission's jurisdiction and (2) preempt states from adopting different requirements for CMRS carriers.[206] If NASUCA's petition is denied on grounds it is not the appropriate procedural vehicle to address carriers' regulatory line items under the *TIB Order*, then it is doubly inappropriate to treat Nextel's comments as a request for a declaratory ruling.

Finally, Leap suggests that the Commission's authority over CMRS carriers preempts states from imposing further restrictions regarding line items, noting that it "emphatically agrees" with NASUCA that the issue is solely the Commission's to address.[207] Leap's "agreement" is purely contrived: NASUCA does not suggest that states are preempted from addressing CMRS carriers' line items anywhere in its petition. Instead, NASUCA simply pointed out that the Commission is the body best placed to establish a nationwide standard dealing with "regulatory" line items imposed by IXCs (who usually provide interstate service) and CMRS carriers (since many states have expressly removed CMRS carriers from their utility

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[204] *Fedor, supra*, distinguishing *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000) (a cell tower siting / market entry case); *see also Nixon,* supra (State attorney general could pursue state claims against wireless carrier based on false advertising and billing in state court and was not preempted by Section 332); *Marcus v. AT&T Corp.*, 138 F.3rd 46, 54 (2nd Cir. 1998) (Congress intended to allow claims based on deceptive business practices, false advertisement, or fraud to proceed under state law).

[205] Nextel relies heavily on *Bastien* but conveniently omits the contravening case law developments, such as *Fedor* and *Nixon, supra.*

[206] Nextel Comments, pp. 30-31.

[207] Leap comments, pp. 16-18.

commission's jurisdiction).[208] State commissions are not preempted from addressing IXCs' "regulatory" line items application to purely intrastate traffic and many state commissions continue to exercise jurisdiction over CMRS carriers' "other terms and conditions" of service, which may extend to line items.

VII. IF THE COMMISSION DETERMINES THAT IT IS NOT APPROPRIATE TO ADDRESS THE ISSUES RAISED IN NASUCA'S PETITION BY MEANS OF A DECLARATORY RULING, THE COMMISSION SHOULD TREAT THE PETITION AS A REQUEST TO INITIATE A RULEMAKING.

If the Commission determines that NASUCA's petition for declaratory ruling is not the appropriate vehicle for addressing all line items not authorized by federal, state and local government, then the Commission should treat NASUCA's petition as a request to initiate a rulemaking to address those issues that fall outside the TIB docket. Based on the extensive record already developed, any such rulemaking should be undertaken expeditiously. However, as argued above, the Commission should press ahead to address the so-called "regulatory" assessment fees that are properly within the ambit of the TIB proceeding.

There should be no debate about the importance of the issues presented. No one genuinely disputes NASUCA's contention that "regulatory" line items are increasingly being used to generate revenues in the telecommunications industry. Telecommunications subscribers pay hundreds of millions of dollars a year to carriers in connection with these line items. Although there is disagreement among the commenters regarding whether, and to what degree, consumers are confused by the "regulatory" line items on their monthly bills, the record in the Commission's original TIB docket indicated substantial confusion over monthly charges. There is at least some evidence that such confusion continues over regulatory line items. Furthermore, it has been nearly six years since the original TIB proceeding and the Commission should refresh the record to see if its TIB rules are having their desired effect. The Commission should also

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[208] NASUCA Petition, p. 6.

take into consideration that there was support for NASUCA's petition among a broad spectrum. Consumers and consumer protection groups filed comments in support of NASUCA's petition. Regulators – including the representative of all state commissions – filed comments in support of NASUCA's petition. And finally even some carriers filed comments supporting NASUCA's petition.

For these reasons, the Commission should not delay or dismiss NASUCA's petition on procedural grounds, but instead should deal with all issues within the scope of the TIB proceeding immediately, and treat NASUCA's petition as a request to initiate a rulemaking for all issues which may fall outside the TIB. Based on the record developed in response to NASUCA's petition, any such rulemaking should be undertaken as soon as possible.

VIII. CONCLUSION

For the reasons set forth in NASUCA's petition, in the comments filed in response to the Public Notice, and herein, the Commission should prohibit IXCs and CMRS carriers from placing line item surcharges on their customers' bills unless (1) such charges are specifically mandated or authorized by federal, state or local law, and (2) the amount of such charges conform to the amounts authorized by government.

Respectfully submitted,

Patrick W. Pearlman
Deputy Consumer Advocate
The Public Service Commission
of West Virginia
Consumer Advocate Division
723 Kanawha Boulevard, East
Charleston, WV 25301
304.558.0526

David C. Bergmann
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614.466.8574
Chair, NASUCA Telecommunications Committee

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
301.589.6313

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2004, I caused true and correct copies of the foregoing *"National Association of State Utility Consumer Advocates Reply Comments"* to be served on all parties listed below by electronic filing.

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

PATRICK W. PEARLMAN
Consumer Advocate Division
Public Service Commission
of West Virginia
723 Kanawha Blvd., East
7th Floor, Union Building
Charleston, WV 25301
Tel: 304/558-0526
WV State Bar No. 5755

Federal Communications Commission

The FCC Acknowledges Receipt of Comments From ...

National Association of State Utility Consumer Advocates

...and Thank You for Your Comments

Your Confirmation Number is: '2004813370062 '	
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